STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FLOYD PHILLIP ALLEN,

Defendant-Appellee.
_____/

Supreme Court No. 151843

Court of Appeals No. 318560

Ionia Circuit Court No. 2013-015693-FH

REPLY BRIEF OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

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I. Allen agrees that the Court of Appeals erred, but he does not go far enough, because he ignores a key holding of *People v Brown*.

Allen agrees with the People that the Court of Appeals erred in holding categorically that the trial court could not enhance his sentence for SORA-2 under the second-offense habitual-offender statute. (Def's Answer to the People's Application, p 5.) Allen concedes, contrary to the Court of Appeals' holding, that if the prosecution had sought to enhance his sentence with a *different* prior conviction (for example, his 2007 conviction for fourth-degree criminal sexual conduct), "then the prosecution would have a valid argument." (*Id.*)

His concession mirrors the holding of *People v Eilola*, in which the Court of Appeals held that a sentence under the recidivist retail-fraud statute, MCL 750.356c(2), could be enhanced under the habitual-offender statutes using a prior conviction of something other than retail fraud. 179 Mich App 315, 321–324; 445 NW2d 490 (1989). *Eilola* did not hold that a sentence could not be enhanced using a prior retail-fraud conviction, but "le[ft] that issue . . . for determination in the appropriate case." *Id.* at 324–325.

The appropriate case arrived the following year in *People v Brown*, 186 Mich App 350; 463 NW2d 491 (1990). The *Brown* court distinguished the retail-fraud statutes from the controlled substances act, and held that a sentence for first-degree retail fraud under the recidivist subsection *can* be enhanced under the habitual-offender statutes using a prior felony retail-fraud conviction. *Id.* at 357.

The *Brown* court began with the statutory language and noted that neither the habitual-offender statutes nor the first-degree retail-fraud statute contains any bar to using the prior retail-fraud conviction to establish habitual-offender status. *Id.* at 354. It then addressed two cases that dealt a different statute—the controlled substances act—to explain how that statute differed. *Id.* at 354–357 (discussing *People v Franklin*, 102 Mich App 591; 302 NW2d 246 (1980), and *People v Edmonds*, 93 Mich App 129; 285 NW2d 802 (1979)). These two cases both involved an offender convicted under the controlled substances act and addressed whether the offender's sentence could be enhanced under the habitual-offender statutes. One of the cases (*Franklin*) held that the offender's sentence *could* be enhanced as a habitual offender because her prior felony convictions were not also controlled-substance convictions. 102 Mich App at 594. The other case (*Edmonds*) held that the sentence could *not* be enhanced as a habitual offender because the prior felony conviction was also a controlled-substance conviction. *Franklin*, 102 Mich App at 594.

Brown explained that *Franklin* and *Edmonds* dealt with a different statutory framework: "while the controlled substances act contains sentence-enhancement characteristics similar to the habitual-offender statutes, the first-degree retail-fraud statute does not." *Brown*, 186 Mich App at 356. Both "the controlled substances act and the habitual-offender statutes provide for gradations of punishment upon subsequent convictions." *Id.* The retail-fraud statute, in contrast, "does not provide for gradations of punishment." *Id.* "Rather, it punishes the commission of a second-

degree retail-fraud offense by a person with a prior conviction for a subsection 2 offense *as a separate substantive offense*." *Id.* (emphasis added). "In other words, while both the controlled substances act and the general habitual-offender statutes use prior convictions to establish the severity of *punishment* for the repeat commission of criminal acts, the first-degree retail-fraud statute uses prior convictions to establish the severity of the *offense*." *Id.* at 356–357.

Allen does not appear to recognize that *Brown* extended *Eilola*'s holding to allow habitual-offender enhancement using a prior conviction of the same type of offense, while also allowing the prior conviction to elevate the severity of the offense. For that reason, he does not offer any explanation as to why *Brown* is unpersuasive. Instead, Allen cites another case about the controlled substance act, namely *People v Fetterley*, 229 Mich App 511; 583 NW2d 199 (1998), claiming that it "definitively refined" *Eilola*. (Def's Answer, p 4.) But it is more accurate to say that *Fetterley* recognized that *Eilola* addressed a different issue: *Fetterley* was based on one set of statutes, and *Eilola* was based on another, and it is the differences in the statutory texts that drove the different results in the two cases. *Fetterley* reaffirmed *Brown*'s reasoning, and set forth the rule to be applied in each of three types of cases, in terms that demonstrate that there is no conflict among the prior decisions:

> Where a defendant is subject to sentence enhancement under the controlled substance provisions, the sentence may not be doubly enhanced under the habitual offender provisions. *Edmonds*; [*People v Elmore*, 94 Mich App 304; 288 NW2d 416 (1979)]. Where a defendant commits a controlled substances offense, but is not subject to the enhancement provisions of the Public Health Code because, although

> the defendant is an habitual offender, there are no prior controlled substance offenses, enhancement under the habitual offender provisions is permitted. *Franklin*; [*People v Primer*, 444 Mich 269; 506 NW2d 839 (1993)]. Where the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted. *Brown*; *Eilola*; [*People v Lynch*, 199 Mich App 422; 502 NW2d 345 (1993)]; [*People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991)]. [*Fetterley*, 229 Mich App at 540–41.]

The only question, then, is whether the recidivist SORA statute is more like the statutes that create a separate offense—i.e., like the recidivist retail-fraud statute at issue in *Eilola* and *Brown*, the recidivist fleeing-and-eluding statute at issue in *Lynch*, and the recidivist OWI statute at issue in *Bewersdorf*—or more like a statute that merely enhances the punishment—i.e., like the controlled substances act at issue in *Fetterley*, *Edmonds*, *Elmore*, *Franklin*, and *Primer*. By analogizing this case with *Eilola*, where the statute created a separate offense, and by conceding that his sentence could have been enhanced if only the prosecution had used a different prior conviction to do so, Allen appears to concede that the SORA statute, like the retail-fraud, OWI, and fleeing-and-eluding statutes, "elevates the offense, rather than enhances the punishment, on the basis of prior convictions." *Fetterley*, 229 Mich App at 540.

If this is Allen's concession, it is correctly given. The reasoning of *Eilola* and *Brown* apply to the SORA statute. Under the thorough and persuasive reasoning of *Brown* and *Fetterley*, habitual-offender enhancement was proper here, and the Court of Appeals erred in holding otherwise. This Court should grant leave and reverse.

II. Although the Court of Appeals cited *Brown*, it ignored the analysis and holding relevant to this case.

In their application for leave to appeal, the People noted that the decision below conflicts with, inter alia, *Brown*. (People's Application for Leave to Appeal, p 3.) Allen asks, "[H]ow can the decision in the instant case be in conflict with a case it relied on as basis for its decision?" and points out that the court below cited *Brown*. (Def's Answer, p vi.) The answer is that *Brown*, like most opinions, contains more than one holding. The Court of Appeals below cited *Brown* for the proposition that "[w]here there is a conflict between sentencing schemes, the specific enhancement statute will prevail to the exclusion of the general one." *Allen*, slip op. at 12, citing *Brown*, 186 Mich App at 356 (alterations omitted).

The reason the court below reached a decision inconsistent with *Brown* even as it cited *Brown* is that it failed to recognize the persuasiveness and applicability of *Brown*'s analysis. It is one thing to cite a rule that appears in another case, but it is another to follow that case's reasoning and reach a consistent outcome. The rule the court below cited from *Brown* did not prevent habitual-offender enhancement in *Brown*, because the Court of Appeals correctly held in that case that there was no conflict between statutes such that one must prevail and the other fail. For the same reasons, there is no conflict of statutes in this case, and the rule cited from *Brown* should not have prevented habitual-offender enhancement here.

III. This case is not mooted by Allen's parole.

Allen claims this case is moot because he was paroled March 24, 2015, and his supervision will be discharged June 24, 2016.[1] But there is no guarantee that he will be discharged June 24, 2016. That event depends on Allen's willingness to comply with the court orders on which his parole depends. As Allen's two SORA convictions attest, compliance with this type of requirement is not his strong suit. The People hope that Allen proves willing to comply with both the requirements of his parole and the requirements of SORA, so that he will be discharged on the projected date. But as long he is on parole, the possibility remains that he will violate his parole conditions and be returned to prison to continue serving his SORA-2 sentence. Because of that possibility, the length of his sentence matters, and the question is not moot.

If, however, Allen is correct that his release on parole moots this issue, then the Court of Appeals erred in addressing it. If this Court agrees with Allen on this point, then it should grant leave to vacate that portion of the Court of Appeals' opinion that improperly decided a moot question. *People v Richmond*, 486 Mich 29, 41; 782 NW2d 187 (2010).

[1] When Allen (then appellant in the court below) was released on parole, he did not move to withdraw his sentencing claim as moot.

CONCLUSION AND RELIEF REQUESTED

For these reasons, and for the reasons expressed in the People's application for leave to appeal, the People respectfully request that this Court grant the application for leave to appeal or summarily reverse the Court of Appeals.

Respectfully submitted,

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